No. 1804.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Southern Pacific Company, a corporation, et al.,
Appellants,
vs.
The Arlington Heights Fruit Company, et al.,
Appellees.

APPELLANTS' CLOSING BRIEF.

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I.

Appellants did not Waive Their Exemption from Being Sued in the District in Which the Bill was Filed.

1. *Pleas do not go to the merits.*

Appellees' argument, oral and written, to show that appellants waived the question of jurisdiction over their persons is based upon the premise that the pleas "invoke a decision of the court upon the merits or equities of the bill."

If, therefore, the pleas do not invoke such decision their premise is erroneous and the waiver claimed does not exist.

The pleas invoke no such decision.

While they somewhat differ in the form of statement, the pleas of the three defendants set forth the same grounds, which in the order stated therein are:

1. That the court has no jurisdiction of the persons of appellants.
2. That the court has no jurisdiction to determine whether the rate duly established is reasonable or unreasonable prior to the determination thereof by the Interstate Commerce Commission.
3. That the court has no jurisdiction of any of the persons mentioned in the bill because none of them are inhabitants of its district.

That the first ground does not invoke a decision upon the "merits or equities" of the suit is plain. This is conceded by appellees.

The second ground of the plea does not, as counsel for appellees assert on pages 12 to 15 inclusive of their brief, "require a consideration and decision from the court as to the entire scope of the equity powers of the courts of the United States involving a construction not only of the laws of congress but of the constitution of the United States."

This ground of the plea is very specific, and is directed specially and expressly to the power and the jurisdiction of the court to determine whether a given rate duly established in accordance with law is reasonable or unreasonable. Manifestly, then, the plea has nothing whatever to do with any other power of the court.

Counsel for appellees have erroneously regarded the second ground of the plea as equivalent to the plea usually filed in such cases, namely, that the court does not have jurisdiction of the subject-matter of the action, which, of course, invokes a decision much broader in its scope than is the one invoked by the second ground of the plea as it is stated in this case.

But for the present we may concede, for the sake of the argument, that the second ground of the plea is as broad as counsel for appellees assert, and still their argument as to its effect is unsound, as is shown by the cases cited by them.

In the case of St. Louis etc. Ry. Co. v. McBride, 141 U. S. 127, 35 L. Ed. 659 (page 8 of their brief), it appeared that the railway company filed a demurrer on three grounds, namely: (a) Because the court had no jurisdiction of the persons of the defendant; (b) because the court had no jurisdiction of the subject-matter of the action; and (c) because the complaint did not state facts sufficient to constitute a cause of action.

In construing the demurrer and defining its scope and effect the court said:

> "Its (the company's) demurrer, as appears, was based on three grounds—*two referring to the question of jurisdiction* and the third that the complaint did not state facts sufficient to constitute a cause of action."

In the case of Western Loan Company v. Butte and Boston etc. Co., 210 U. S. 368, 53 L. Ed. 1101 (page 8 of their brief), it appeared that a demurrer was filed alleging that the court had no jurisdiction of the subject of the action, that the court had no jurisdiction of the

person of the defendant, that the complaint does not state facts sufficient to constitute a cause of action, that the complaint is uncertain, and that it is unintelligible.

In this case on the effect and scope of the demurrer the court cited the case of St. Louis etc. R. Co. v. McBride, *supra*, and incorporated in its opinion the quotation therefrom which we have heretofore made.

The McBride and Western Loan Company cases, *supra*, therefore, are authority for the proposition that a plea that the court has no jurisdiction of the subject-matter of the action is purely one to the jurisdiction of the court and one which does not invoke a decision upon the "equities or merits" of the suit.

The text writers lay down the same rule.

In Bates on Federal Procedure, Vol. 1, section 241, it is stated that among pleas which go *only* to the jurisdiction of the court is a plea "that the subject-matter of the suit is not within the jurisdiction of a court of equity."

In Beach on Modern Equity Practice, Vol. 1, section 301, it is said:

> "Pleas to the jurisdiction are that the subject of the suit is not within the jurisdiction of a court of equity; or that some other court of equity has the proper jurisdiction; or that the defendant has not been properly served with process."

It follows, then, that counsel for appellees are in error when they say that the second ground of the plea invokes a decision on the merits of the case.

There is another view of the situation as presented by the bill and the second ground of the plea which, aside

from what we have heretofore said on the subject, demonstrates the error of counsel's position.

As before stated the plea in express terms is directed only to the power or jurisdiction of the court to determine whether a rate duly established is reasonable or unreasonable prior to a determination of its reasonableness or unreasonableness by the Interstate Commerce Commission, because the exclusive right to determine such question is vested by the Interstate Commerce Act in said commission.

By the construction placed upon the bill by counsel for appellees the reasonableness or unreasonableness of the rate complained of is not involved in this suit and therefore the plea cannot possibly invoke a decision upon the equities or merits of the suit as it is not directed to anything else.

In the oral argument in the Circuit Court Mr. A. F. Call in construing the bill said:

> "What we seek to do in this case is to have the court enjoin them from perpetrating a wrong by forming a conspiracy to injure our property and disturb the *status quo*. * * * What we ask this court to do is to take away from these parties the power to, by illegal and unlawful combination, destroy that contract (referring to the old rate). We ask the court to restrain these parties from destroying the existing contract; not make a new contract; nor destroy the contract made. * * * All we ask the court to do in this case is to prevent these transcontinental lines from doing a wrongful act, and an illegal act, if the court, please, of disturbing and destroying our existing rate." [Record, pages 272, 273.]

Mr. Joseph Call in his oral argument in the Circuit Court on the same subject, said:

> "We are not seeking to annul any contract or any tariff that is in existence today. We are simply asking that these defendants be enjoined from doing an illegal thing; from doing anything that is prohibited by the law." [Record, page 279.]

And in his oral argument before this court Mr. Joseph Call on the same subject said:

> "We have not sought to usurp or ask this court to usurp the functions of the Interstate Commerce Commission. We have shown by the bill that we have brought this suit and that it is pending before the commission. We have only asked the aid of this court to stay the hands of wrongdoers until the commission can pass upon and determine the questions we have submitted. We have in no way invaded the domain of the commission." [Reporter's Transcript, page 22.]

Now, on their own construction of the bill, the second ground of the pleas is directed at no issue in the case, a subject-matter not involved therein, and cannot possibly operate as a waiver of any other ground of the plea. In so far as the second ground of the plea has a bearing upon the subject of waiver, it must be disregarded on counsel's own contention.

There is nothing in the third ground of the pleas that invokes a decision on the "merits or equities" of the bill. *It goes only to the question of the jurisdiction of the court over the persons of any of the parties defendant.* While it states that certain parties mentioned in the bill are indispensable, still it also shows that those parties cannot be sued in the district in which the bill is filed. This part of the pleas is in aider of the first part and

the two together show that the court had not acquired and could not acquire jurisdiction over the persons of any of the parties mentioned in the bill. By the first and third grounds of the pleas the case is shown to be one wherein the court cannot find that as its process can bring in some of the parties defendant it will retain jurisdiction of all and of the case.

The third ground, therefore, no more invokes a decision on the "merits or equities" than does the first ground. They both relate to jurisdiction of persons only.

2. *Uniting of grounds no waiver.*

From what has been heretofore said it is clear that there was not in the first or any instance in this case a general appearance by appellants. This distinguishes this case from those cited in the brief of appellants.

But there is a still further distinction. It is this:

The appellants appeared specially for the purpose of objecting to the jurisdiction of the court over their persons *and assigned this objection as the first ground of their pleas. This ground was the first argued and disposed of.* [Record, pages 252-4.]

The fact that other grounds of objection to the jurisdiction of the court were also pleaded cannot effect a waiver of the first.

In Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237, Mr. Justice Field said:

> "Illegality in a proceeding by which jurisdiction is to be obtained, is in no case waived by the appearance of defendant for the purpose of calling attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer.

He is not considered as abandoning his objection because he does not submit to further proceedings without contestation."

In S. P. Co. v. Denton, 146 U. S. 202, 36 L. Ed. 943, Mr. Justice Gray said:

"Neither the special appearance for the purpose of objecting to the jurisdiction, nor the answer to the merits after that objection had been overruled, was a waiver of the objection. The case is within the principle of Harkness v. Hyde, in which Mr. Justice Field, speaking for this court, said: 'Illegality in a proceeding by which jurisdiction is to be obtained, is in no case waived by the appearance of defendant for the purpose of calling attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation.'"

In Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 37 L. Ed. 699, the court said:

"In Harkness v. Hyde, 98 U. S. 476, it was held by this court that illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied by his answering to the merits. *Such illegality is considered waived only when he, without having insisted upon it, pleads in the first instance to the merits.*"

To the same effect are the cases of

Goldey v. Morning News, 156 U. S. 518, 39 L. Ed. 517;

In Re Atl. City R. Co., 164 U. S. 635, 41 L. Ed. 580.

The rule of the foregoing cases has been followed and applied in numerous decisions of the other federal courts and of the courts of last resort of various states. It may therefore be said to be established and settled.

Under this rule appellants might have filed pleas to the jurisdiction of the court of their persons, those pleas might have been denied and appellants could thereafter have filed other pleas on the other grounds specified in the pleas filed by them in this case, demurred upon all of the grounds of the pleas and to the merits of the bill, or might have answered without waiving the question of jurisdiction of their persons.

This being true there is no reason for holding that the waiver of the question of jurisdiction *in personam* followed the uniting in one special appearance the subjects of several. Every reason for holding to the contrary exists. It is the aim and desire of every court speedily to end suits pending therein. Laws and rules of practice are made for the accomplishment of this. But that aim and desire and those laws and rules are necessarily for naught unless it be held that two or more pleas, in their nature dilatory—neither of which goes to the merits of the cause—can be joined without waiver of one or more of them.

To illustrate: Suppose appellants here had filed pleas on the first ground only, after its denial had filed another on the second ground, and after its denial still another on the third ground, and had insisted each time on having these various pleas set down for hearing, would this practice have been in the interest of speed? Most assuredly not.

For our position in the matter of joinder of pleas there is a late decision of the Supreme Court of the United States.

In Davidson Brothers M. Co. v. Gibson, 213 U. S. 10, 53 L. Ed. 675, defendants appeared specially and filed, first, a demurrer, and, second, a motion to quash. The demurrer was on the grounds:

> "*First.* That the court has no jurisdiction of the defendants or either of them.
>
> "*Second.* That the plaintiff is not a resident or citizen of the Northern District of California in the Ninth Judicial Circuit or of the state of California.
>
> "*Third.* That the defendants are not nor is either of them a resident or citizen of the Northern District of California in the Ninth Judicial Circuit or of the state of California.
>
> "*Fourth.* That, at the time of the commencement of this action, the plaintiff, Murray Gibson, trading as John Gibson, was and now is a citizen and resident of the state of Pennsylvania, and that, at the time of the commencement of this action, the defendants were, and each of them was, and now is, a citizen and resident of the state of Illinois.
>
> "*Fifth.* That this court has no jurisdiction of the subject of the action.
>
> "*Sixth.* That this court has no jurisdiction of the controversy alleged in the complaint."

The motion to quash was on the ground that the court had no jurisdiction of the persons of the defendants because they were non-residents of this district, and that it had no jurisdiction of the controversy at issue.

It was contended that defendants appeared generally and waived their exemption from being sued in the district in which the bill was filed. The court, after reviewing the cause and the authorities applicable, said:

> "It follows, therefore, that the court below was

without jurisdiction of the cause; and as the defendants have taken no action whatever in response to the summons, except to appear specially and object to the jurisdiction, it cannot possibly be said that the objection to the jurisdiction has been waived. * * *

"To sum up, the Circuit Court for the Northern District of California had no jurisdiction to entertain this suit against these defendants, who are not inhabitants of that district, but, on the contrary, inhabitants of the state of Illinois. The defendants appeared specially, as they had a right to do, solely for the purpose of objecting to the jurisdiction."

3. *No waiver as court did not otherwise have jurisdiction.*

In St. Louis Ry. Co. v. McBride, 141 U. S. 127, 35 L. Ed. 659, it was held that jurisdiction of the person could be waived—

"If the case was one of which the court could otherwise take jurisdiction."

All of the other cases cited by appellees are to the same effect.

On the authority of these cases, then, one of the elements of waiver is that the case made by the bill must be one of which the court has jurisdiction independently of the question of jurisdiction *in personam.*

This element of waiver does not exist here, we respectfully submit.

We make this assertion mindful of and with great respect for the decisions of this court in Northern Pacific R. Co. v. Pac. Coast L. Co., 165 Fed. 1, and Northern Pac. Co. v. Oregon etc. L. Co., 165 Fed. 13.

Were it not for the fact that we fully believe that this

court will not follow its ruling in the decisions last cited, on account of the decision of the Supreme Court in the case of Baltimore & Ohio R. Co. v. United States *ex rel.* Pitcairn Coal Co., decided January 10, 1910, we would not make the point we are now presenting.

In the Pitcairn Coal Company case, *supra*, it is shown that a circuit court does not have jurisdiction of the case made by the bill here. We have quoted from the case fully at pages 26 to 33 of our opening brief.

Judge Dayton, of the Northern District of West Virginia, agrees with us in our view of the Pitcairn case in an opinion in an equity case which is as follows:

> "A careful study of the opinion of the Supreme Court handed down on January 10, 1910, in the case of The Baltimore and Ohio Railroad Company *et al.* v. United States *ex rel.* Pitcairn Coal Company *et al.*, convinces me that its rulings are decisive of this case. It is there held that federal courts can assume no jurisdiction, under section 23 of the Interstate Commerce Act, to regulate the distribution of coal cars until the matter has first been presented to and passed upon by the Interstate Commerce Commission. The court there says:
>
> " 'When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission and not subject to be judicially enforced, at least until that body, clothed by the statute with authority on the subject, had been afforded by a complaint made to it the opportunity to exert its administrative functions.'
>
> "The court then approved the ruling in T. & P. R. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, and holds that it is enforced and made more imperative by the amendments to the Interstate Commerce Act adopted in 1906, after this decision was rendered.

"In the case of the Interstate Commerce Commission v. The Illinois Central Railroad Co., decided by the Supreme Court on this same 10th day of January, 1910, it was held that, under section 15 of the act as enacted by the amendment of June 29, 1906, the courts were without power to invade the administrative functions vested in the commission, and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom and expediency, and the commission was upheld in its contention that it was authorized to enforce its order and disregard the court's injunction of it.

"From these decisions it follows inevitably, I think, that this court is without jurisdiction to grant to the plaintiffs the relief prayed for herein, and that the restraining order heretofore awarded must be dissolved and the bill dismissed for want of jurisdiction, without prejudice. A decree to this effect is ordered."

II.

Authorities Cited by Appellees on Subject of Waiver Considered.

Fitzgerald v. Fitzgerald, 137 U. S. 98, 44 L. Ed. 698.

The most cursory reading of the opinion in that case will disclose its utter inapplicability here.

The point in the case at bar to which it is cited was not made and, of course, not considered.

There was no special appearance for the purpose of objecting to the jurisdiction of the court in any way. In an amended answer it was pleaded that the court had no jurisdiction, because service of summons had been accomplished by trick and fraud. But that came into the case long after defendant had completely submitted to the court's jurisdiction in every way.

Thus, it appears that the facts in the Fitzgerald case, *supra,* are totally different to those in this case.

St. Louis etc. Ry. Co. v. McBride, 141 U. S. 127, 25 L. Ed. 659;

Western Loan Co. v. Butte & Boston etc. Co., 210 U. S. 368, 52 L. Ed. 1101;

B. & O. Ry. Co. v. Doty, 133 Fed. 866;

Mahr v. Union Pac. R. Co., 140 Fed. 921;

Peale v. Marian Coal Co., 172 Fed. 639.

The foregoing cases cited by appellees on pages 8 and 9 of their brief, are all alike so far as concerns the facts upon which the decisions therein were based.

In none of them was there a special appearance for any purpose whatever. In all of them a demurrer was filed on the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action. This ground, of course, clearly invoked a decision of the merits and was inconsistent with the idea of want of jurisdiction in any particular.

These cases in point of fact are totally at variance with the case at bar, because in the latter there is a special appearance for the purpose of objecting to the jurisdiction of the court, and nothing in the plea filed upon that special appearance is inconsistent with the idea that the court has no jurisdiction to proceed. This we have already shown.

We have also shown that if these cases are authority here they are against the position of appellees, for in each of them one of the elements of the waiver adjudged was that the court had jurisdiction of the subject matter of the action and the right to proceed with the cause if it had jurisdiction of the person.

In the case at bar that element is not present, as we have heretofore stated.

On page 9 of their brief, appellees set forth a quotation from the Mahr case, *supra*, with considerable confidence and reliance, but we respectfully submit that the law as stated in that quotation is no longer law in such cases since the decision of the Supreme Court in the case of Davidson Bros. M. Co. v. Gibson, 213 U. S. 10, 53 L. Ed. 675. The case last cited in fact overrules the Mahr case, *supra*.

III.

Appellees' Second, Third and Fourth Points Considered.

Points second and third (appellees' Brief, pp. 16 to 19), about jurisdiction of the court over the persons of defendants, are fully met by what we have heretofore said. The third ground of the plea shows that none of the defendants are inhabitants of the district in which the bill was filed, and therefore that the court could not bring them in by its process. This, then, is not a case wherein a court has jurisdiction over the persons of some of the defendants and on account of this fact will proceed to dispose of the case—the kind of a case which appellees, in their second and third points, try to make it.

Appellees' fourth point (pp. 19 to 23) is decided against them by the Pitcairn Coal Company case, *supra*, as we have heretofore shown.

Moreover, on account of a misconception of the pleas filed by appellants, counsel for appellees have considered in their fourth point a phase of the case not before the court upon this appeal.

In support of their fourth point counsel for appellees set forth unreported decisions of the judges of the federal courts (see pages 21-23).

In our brief (pages 36 and 37) we have cited a list of cases to the contrary, and in addition to that list we cite the following:

Vanderslice-Lynds Merc. Co. v. M. P. R. Co., decided Jan. 7, 1902, by Hoak, J., case No. 7809, in the Circuit Court of the District of Kansas, First Division. Not reported.

C. W. Robinson Lumber Co. v. Ill. Cent. R. Co., decided May 29, 1903, by Niles, J., in the Circuit Court for Southern District of Mississippi. Not reported.

Columbus Iron & Steel Co. v. Kanawha & M. R. Co., decided May 27, 1909, by Keller, J., in the Circuit Court for the Southern District of West Virginia. Not reported.

Imperial Colliery Co. v. C. O. Ry. Co., No. 157, in Equity, decided by Keller, J., in the last mentioned court. Not reported.

The Powhatan C. & C. Co. v. Norfolk & W. R. Co., No. 158, in Equity, decided by Keller, J., in the same court. Not reported.

Houston C. & C. Co. v. Norfolk & W. R. Co., decided by McDowell, J., in the Circuit Court of the Western District of Virginia. Not reported.

Powhatan C. & C. Co. v. Norfolk & W. R. Co., decided by McDowell, J., in the same court. Not reported.

IV.

The Order Appealed From Should be Reversed with Directions to Dismiss Without Prejudice.

Appellants having in the *first instance* appeared specially and claimed their exemption from being sued in the district in which the bill was filed, and, also, on such appearance, having shown the want of jurisdiction of the court in other particulars, the bill should have dismissed without prejudice.

Counsel for appellees concede that such should have been the disposition of the suit unless appellants waived their exemption mentioned.

That no such waiver was made we have shown because:

1. Appellants' *first act* in the suit was to object to being sued in the district in which the bill was filed.

2. Though the pleas set up grounds for want of jurisdiction other than *in personam* they did not invoke a decision upon the merits of the case or upon any theory or thing therein contrary to the idea that the court had no jurisdiction at all.

3. The court had no jurisdiction of the case made by the bill independently of the question of jurisdiction *in personam*.

4. It would have been a useless waste of time of court, parties and counsel if as many special appearances had been made as there are grounds in the pleas. If any court can and should see to it that time should not be uselessly consumed it is a court of equity.

5. The second ground of the pleas, according to the definition of the bill by counsel for appellees, being directed to a matter not involved in the suit,

stands as if it had not been made and should be disregarded entirely.

Respectfully submitted.

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